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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

MANHATTAN PROPERTIES, INC.,
Petitioner,

vs.

IRVING TRUST COMPANY, as Trustee in Bankruptcy of Oliver A. Olson Co., Inc.,
Respondent.

RESPONDENT'S CONSENT TO WRIT.

To the Honorable, the Chief Justice of the United States and the Associated Justices of the Supreme Court of the United States:

This is a petition for a writ of certiorari to review an affirmance by the Circuit Court of Appeals of the Second District of an order expunging a claim in bankruptcy for damages for an alleged breach of a lease of real property, located in New York City, between the bankrupt as tenant and the petitioner as landlord. It is claimed that the filing of the petition in bankruptcy and the subsequent adjudication constituted an anticipatory breach of the lease.

I.

Respondent is led to consent to the writ because of the general public interest in the question of law presented and the number of similar cases now pending in the lower courts.

This is the only claim for future rent or damages filed by a landlord in this case. The time for filing claims has long since expired. The present status of the estate is that all of the assets have been liquidated and are now in the form of cash awaiting distribution to creditors. All claims other than that of the petitioner have been allowed or otherwise finally determined.

In several recent decisions—in at least three of which, as your petitioner is advised, petitions have been or will shortly be submitted for writs of certiorari—the Circuit Court of Appeals has in its opinions used expressions indicating that a further review of this question should be had.

The respondent further bases its consent upon the fact that the decision in the accompanying *Brown* case, which case is mentioned in the petition and in the brief in support of the petition, is largely based on the opinion of the Circuit Court in the instant case. The respondent is advised that it is most unlikely that this court would deny one petition and grant the other, but that it would probably prefer to have the argument proceed on both cases at the same time.

The respondent is advised that in connection with the *Brown* case, a brief has been filed by amicus curiae, representing numerous landlords and associations of building owners. Surely this is indicative of the wide and sincere public interest in the questions now before the

court. The respondent, therefore, joins with the petitioner in the prayer that the petition may be granted and reserves for final hearing the presentation of its argument on the merits.

In consenting to the issuance of the writ, the respondent neither suggests nor concedes that the decree of the Circuit Court was erroneous. On the contrary, the respondent is of the opinion that, at the final hearing, this court will hold that the decree of the Circuit Court was in all respects correct and that the petitioner in the instant case has no provable claim.

Neither does the respondent suggest nor concede that the final decision of this court in the *Brown* case would necessarily be determinative of the provability of the claim in the instant case. The Manhattan Properties, Inc., lease contains a month to month deficit clause: while the lease in the accompanying *Brown* case contains a simple loss clause. For this reason, among others, it is and will be contended by the respondent that were this court to hold that bankruptcy constitutes an anticipatory breach, no provable claim for damages could be predicated on the terms of the Manhattan Properties, Inc., lease.

II.

Respondent will argue at the hearing on the merits that the validity of a landlord's claim in bankruptcy is to be determined in accordance with principles of local law; that the decree of the Circuit Court in this case followed precedent which is in complete harmony with the law of New York, the State where the claim arose and where the property is situated; that claims for future rent or for damages for anticipatory breach of a lease are not provable claims under the Bankruptcy Act; that there are sound reasons of policy why they should not be held provable; that even were they held generally provable, under the terms of the lease before the court, the claim of Manhattan Properties, Inc., must be rejected.

1. *There are compelling precedents of long standing constituting the great weight of authority in almost all the circuits holding against the petitioner.*

The respondent is advised that there are no true conflicts or real divergencies from the weight of authority in the circuits, and that those claimed divergencies are based primarily upon the proper application of a local principle of law. Therefore, they cannot be considered in conflict with the established general rule. The principle upon which this case was decided in the lower courts has long been settled in the Second Circuit. Landlords and tenants have dealt with each other in reliance upon that rule for over twenty years.

2. *Respondent is advised that the petitioner has misconstrued the cases decided by this court; that there is no decision of this court expressly or impliedly changing the settled rule.* Quite the contrary, this court has in

recent decisions expressed itself as adopting and ratifying the rule in the Second Circuit.

3. *The legislature has adopted the present rule of law. Therefore, a decision of this court upsetting the settled rule would contravene the intention of the legislature.*

The legislature is charged with the knowledge of the settled rule as it existed prior to March 3, 1933. The amendments of March 3, 1933, to the Bankruptcy Act provided for proof of future rent claims in extension proposals for which no provision was found in the Bankruptcy Act. Under such circumstances, where Congress did not see fit to amend the Bankruptcy Act generally, it may be regarded as having adopted the settled rule. Therefore, any change in the present rule may be left to the legislature.

WHEREFORE, the respondent respectfully prays:

1. That the prayer of the petition be granted and that a writ of certiorari issue under the seal of this court to review the decree of the Circuit Court of Appeals in the above case.

2. That upon said hearing, said decree be in all respects affirmed.

Respectfully submitted,

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October 26, 1933.